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Supreme Court, U.S.
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No. 06-413

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Respondent, Cal Coburn Brown, by through his attorneys, Gilbert Levy and Suzanne Lee Elliott, moves for leave to proceed *in forma pauperis* for the purpose of filing the accompanying response to a petition for a writ of certiorari. Undersigned counsel was appointed to represent Mr. Brown in the district court and court of appeals under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Therefore, Respondent is not required to file a declaration in support of this motion. *See* Supreme Court Rule 39.1.

RESPECTFULLY SUBMITTED this 30th day of November, 2006.

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Attorney for Cal Coburn Brown

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RESPONSE TO QUESTIONS PRESENTED

1. The Circuit Court reversed and remanded the case to the state court for resentencing without addressing all the claims that Brown properly raised in the District Court and on appeal. Specifically, the Circuit Court declined to address Brown's claim that he was deprived of his Sixth Amendment right to effective assistance of counsel at sentencing, although it recognized that there was potential merit to the claim. Should this Court exercise certiorari jurisdiction when the judgment in the Court of Appeals is not final and where the Circuit Court's decision remanding the case to state court for re-sentencing is the most efficient and economical use of judicial resources?

2. Where the Circuit Court identified the controlling case law from this Court, gave the proper deference to any factual findings made in the state court as required by 28 U.S.C. § 2254(e)(1), and correctly determined that the factual findings were not supported by clear and convincing evidence, is there any basis for review by this Court?

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I. ARGUMENT

A. BECAUSE THE CIRCUIT COURT DID NOT ADJUDICATE ALL OF THE MERITORIOUS ISSUES PROPERLY, THIS CASE IS INAPPROPRIATE FOR CERTIORARI

In the District Court and in the Circuit Court Brown presented a properly exhausted claim that he was deprived of his Sixth Amendment right to effective assistance of counsel at sentencing under this Court's reasoning in *Rompilla v. Beard*, 545 U.S. 374 (2005) and *Wiggins v. Smith*, 539 U.S. 510 (2003). Brown presented evidence that his trial counsel inexcusably failed to properly investigate the penalty phase defense of mental illness after being specifically advised of the need to do so by a consulting expert. The Circuit Court recognized the merit to this claim but declined to reach any conclusion on this claim because it reversed and remanded on the jury issue. The Court stated:

> Brown's final claim is that his attorney provided ineffective assistance in various ways during the sentencing phase of his trial. Were we not granting habeas relief with respect to Brown's sentence for the reasons set forth above, this claim would merit significant attention. Should the state choose to seek the death penalty again on remand, however, Brown will have a new opportunity to receive effective assistance of counsel. We therefore need not reach this claim.

Brown v. Lambert, 451 F.3d 946, 954 (9th Cir. 2006); Pet. App. at 22a-23a.

The applicable jurisdictional statute is Title 28 United States Court § 1254(1), which in pertinent part provides:

> Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

By the express terms of the statute, this Court has jurisdiction to issue the writ although the judgment is not final. However, the general policy favors sparing exercise of this jurisdiction in cases where a final judgment is absent. In *Hamilton-Brown Shoe Co. v. Wolf Bros. and Co.*, 240 U.S. 251 (1916), this Court stated, "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and importance, or in order to secure uniformity of decisions." The Court continued, "And except in extraordinary cases the writ is not issued until final decree."

The policy in favor of minimizing the impact on scarce judicial resources rather strongly suggests that the best course is to allow the case to be remanded to state court for re-sentencing. On the other hand, if this Court grants the petition and reverses on the grounds suggested by the State, it will by no means end the litigation. Instead, there will be yet another round of litigation in the Court of Appeals, another round of petitioning in this Court, and quite possibly a remand for re-sentencing on the basis of the Sixth Amendment claim. Should a remand occur on that basis, the State will have accomplished nothing by the petition now pending in this Court. A more prudent course of action is the one suggested by

the Court of Appeals. A remand for re-sentencing will likely moot out the ineffective assistance claim as well as the jury issue so that this Court will be relieved of the obligation to consider either claim. Nor is this case one of "particular gravity and importance" since it involves nothing more than the resolution of a factual question. Uttecht has failed to cite to any compelling reasons to overcome the general policy that this Court should decline certiorari jurisdiction in the absence of a final decree. For that reason, the petition should be denied.

B. JUDGE KOZINSKI'S OPINION FOR THE CIRCUIT COURT IN THIS CASE CORRECTLY STATES THE FACTS AND THE LAW, DOES NOT CONFLICT WITH ANY OTHER DECISIONS BY THIS COURT OR OTHER CIRCUIT COURTS, AND REACHES THE PROPER RESULT

A petition for certiorari is proper only when a United States Court of Appeals has entered a decision in conflict with the decision of this Court or another United States Court of Appeals on the same important matter. Supreme Court Rule 10. But a petition for writ of certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* As discussed below, the Circuit Court properly stated the rule of law in this case and properly applied that rule of law to the facts. Although Uttecht makes a strained argument that the Circuit Court opinion conflicts with precedent from this Court or opinions of other Circuits, those arguments are meritless.

1. The Circuit Court followed all of the pertinent precedent from this Court regarding the standards for a challenge for cause during jury selection in capital cases.

In support of his petition for certiorari, Uttecht argues that "the Ninth Circuit Panel explicitly refused to follow *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986)." Petition for Certiorari at 15. This is simply untrue.

In its opinion in this case the panel carefully reviewed this Court's controlling precedent regarding jury selection in capital cases. *Brown*, 431 F.3d at 949-50.[1] This Court has held that a juror may not be excluded merely because of conscientious scruples about capital punishment if the juror is "willing to consider all of the penalties provided by state law" and is not "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968). "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519.[2]

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[1] The parties have never had any dispute about the controlling legal principles regarding this issue.

[2] The State, as the moving party, bears the burden of demonstrating that the *Witt* standard is satisfied as to each challenged juror. *Witt*, 469 U.S. at 424.

In *Witherspoon*, this Court held that jurors with scruples against the death penalty could be excused for cause only where it was "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before them, or (2) that their attitude towards the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Witherspoon v. Illinois*, 391 U.S. at 522-23 n.21.

In *Witherspoon* this Court reaffirmed its decision in *Adams v. Texas*, 448 U.S. 38 (1980). In *Adams*, the Court said that the trial court improperly:

> exclude[d] jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

Adams, 448 U.S. at 49-50.

In *Witt*, the Court generalized the test of exclusion, holding that a juror could be excused only where his or her "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions

and his oath." *Wainwright v. Witt*, 469 U.S. at 424. In cases following *Witt*, the Court affirmed that the erroneous removal of a juror who could impose the death penalty, but might have scruples about doing so, requires automatic reversal of a death sentence. *Gray v. Mississippi*, 481 U.S. 648 (1987); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam).

Relying on these precedents, Judge Kozinski explicitly stated:

> In 1985, and again in 1987, the Supreme Court explained that the "standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment . . . is 'whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' *Gray v. Mississippi*, 481 U.S. 648, 658, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (quoting *Witt*, 469 U.S. at 424, 105 S.Ct. 844 (quoting *Adams*, 448 U.S. at 45, 100 S.Ct. 2521)). The Supreme Court insisted that capital jurors not be struck for cause unless they are unable to follow the court's instructions. Even jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.* (quoting *Lockhart v. McCree*, 476 U.S. 162, 176, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986) (Rehnquist, J.)).

Brown, 451 F.3d at 949-50; Pet App. at 11a - 12a. This is a correct statement of the law. There is no basis for a finding that the Circuit misapprehended the law in any way.

2. The Circuit Court properly concluded that, while the trial court's factual findings were entitled to deference under the Anti-Terrorism and Death Penalty Act (hereinafter AEDPA), the record in this case did not support those findings.

Uttecht's complaint that the Circuit Court did not defer to the Washington State Supreme Court's factual finding that Juror Deal had a view that would prevent or substantially impair his ability to carry out his duties in a capital case was not supported by the record. Again, this is not true.

The Circuit Court was acutely aware of the deference it owed the state court findings under AEDPA. Uttecht does not explain that the Circuit Court actually considered Brown's challenges to three jurors. The panel decision extensively reviewed the transcript of the voir dire of all three and the state court findings as to all three. In two of those circumstances, the Circuit Court found that the record supported the state court findings. The Circuit Court said:

> When the Washington Supreme Court upheld the trial judge's decision to excuse jurors X, Y and Z for cause, it found that both X and Y were "substantially impaired" in their ability to perform their duties as jurors.

Brown, 431 F.3d at 950.

When it came to considering the challenge to Mr. Deal [Juror Z], the Circuit Court's careful examination of whether the record supported the state court findings yielded a different result, however.[3] The Circuit Court examined the Washington State Supreme Court's reasoning and reached two conclusions.

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[3] The Circuit Court included the "entire relevant transcript" of the voir dire of Mr. Deal in a footnote to the opinion. *Brown*, 451 F.3d at 951 n.8. Pet. App. at 14a-17a.

First, the Circuit Court found that: "Nowhere did the Court find that [Mr. Deal] would be unable to follow instructions." *Brown*, 451 F.3d at 950. Uttecht cites only to this portion of the Circuit Court decision. He takes this sentence out of context and argues that Circuit Court somehow understood the law to require express findings by the state courts. Brown has never urged that the state court must use the express phrase "substantially impaired" in order for its findings to be entitled to deference. He has always relied upon the fact that the express record does not support any finding of impairment, no matter how the state court expressed its conclusion otherwise.

Thus, it is notable that Uttecht leaves out of his discussion the very next sentence of the Circuit Court opinion. The Court went on to say:

> Nor could the court have found this: Just like the juror at issue in *Gray*, juror Z "ultimately stated that [he] could consider the death penalty in an appropriate case." *Gray*, 481 U.S. at 653, 107 S.Ct. 2045. Had there been a finding that Z was "substantially impaired" in his ability to follow the law, it would have been unreasonable. See 28 U.S.C. § § 2254(d)(2), (e)(1).

Brown, 451 F.3d at 950-51; Pet. App. at 13a-14a. This passage makes it crystal clear that the Circuit Court understood its obligation to give deference to findings by the state court, examined the state court record to identify any such findings and examined the actual transcript of the voir dire to determine if any such findings, explicit or implicit, were reasonable. The panel expressly cites the

relevant portions of the AEDPA, 28 U.S.C. § 2254(d)(2) and § (e)(1). Nowhere does the Circuit decision require the state court to incant any particular phrase.

At bottom, Uttrecht's argument is that even if the *express* record demonstrates that a juror can follow the law and the instructions, a reviewing court *must* defer to the finding, *implicit* in the trial court's recusal of the juror, that the juror was "substantially impaired." Such a holding would render "*Witherspoon* a dead letter" and "all substantial evidence review of trial court factual findings . . . obsolete." *Brown*, 451 F.3d at 952; Pet. App. 19a.

This argument ignores the fact that the AEDPA permits Brown to rebut the "presumption of correctness" of the state court findings "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The standard is demanding but "not insatiable" and "[d]eference does not by definition preclude relief." *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005). Here, the Circuit Court gave careful consideration to the factual findings of the state courts. The panel decision quotes at length from the voir dire of Mr. Deal and at least one other juror. *Brown*, 451 F.3d at 949-53; Pet. App. 8a –19a. It simply determined that in this case the record, even if accorded deference, did not support those factual findings. After doing so, the Circuit Court reached the conclusion that there was nothing in the record to support the finding that Mr. Deal would not or could not follow the law and the court's instructions. In short, Brown rebutted the "presumption of

correctness" of the state court findings "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). As the Court pointed out:

> In fact, during the course of his voir dire, juror Z stated six times that he could follow the law and impose the death penalty, while not once stating that he might not be able to . . .

Brown, 451 F.3d at 949 n. 5; Pet. App. at 10a.

3. The other decisions cited by Uttecht do not "conflict" with the Circuit Court opinion in this case within the meaning of Rule 10.

The cases that Uttecht alleges conflict with *Brown v. Lambert* are not "conflicting" within the meaning and intent of Rule 10. Uttecht merely cites to cases that apply the same legal principles, but differ in outcome. There is no basis for review in a case where the Circuit Court properly identifies this Court's legal precedents, applies those precedents to particular facts and circumstances, but reaches a conclusion different from other Circuits applying the same precedents to *different* facts and circumstances.

In each of the cases cited by Uttecht, unlike in *Brown*, the Court found that the defendant had failed to rebut the presumption of correctness. For example in the first case cited by Uttecht, *Martini v. Hendricks,* 348 F.3d 360, 368 (3rd Cir. 2003), the Third Circuit, like the Circuit Court here, carefully examined the voir dire of the challenged juror and concluded that Martini had not rebutted the presumption of correctness of the state court findings "by clear and convincing evidence." But in reaching this conclusion the Circuit did note that the

petitioner's claim was a "close and difficult one." *Id.* at 362. The remaining cases that Uttecht alleges "conflict" with the decision here are similar. *See e.g. Sallahdin v. Gibson*, 275 F.3d 1211 (10th Cir. 2002) ("Sallahdin has failed to rebut the trial court's findings by clear and convincing evidence."); *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000) (record supported the trial court's determination that the juror was substantially impaired); *Clemons v. Luebbers*, 381 F.3d 744 (8th Cir. 2004) ("The trial court's dismissal of these six venire members for cause withstands review under Section 2254(e)."); *Kinder v. Bowersox*, 272 F.3d 532 (8th Cir. 2001) ("Kinder has not rebutted with any evidence—much less clear and convincing evidence—the presumption that the Missouri Supreme Court's findings concerning juror bias are reasonable.").[4]

In response, Brown can cite to federal court cases where defendants like him have rebutted the presumption of correctness and that reach the same conclusion as the Circuit Court here. *See e.g. Stevens v. Horn*, 319 F. Supp. 2d 592 (W.D. Pa. 2004), *affirmed by* 187 Fed. Appx. 205 (3rd Cir. 2006) (district court concluded that finding of juror bias was not supported by state court factual findings and, thus, was "unreasonable within the meaning of § 2254(d)(2)."); *Gall*

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[4] *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998) is wholly inapplicable. In that case, Webster had not exhausted all of his peremptory challenges, thus, the Court found that he could not demonstrate that he had been denied his Sixth Amendment right to an impartial jury. The Court only considered whether the

v. Parker, 231 F.3d 265, 331 (6th Cir. 2000), *cert. denied*, *Parker v. Gall*, 533 U.S. 941 (2001) ("Notwithstanding the deference owed to the trial judge, we find that the factual record does not fairly support [the juror's] exclusion under the standards of *Adams* and *Witt*.").

There is no doubt that in applying the controlling precedent from this Court, the lower courts can reach different conclusions as to whether or not the state court findings are supported by clear and convincing evidence. But differing outcomes are not the kind of "conflict" that necessitates review under Rule 10. Review is, therefore, inappropriate on that basis.

4. The Court of Appeals correctly determined by clear and convincing evidence that the state court findings were affirmatively refuted by the record.

The record makes it unmistakably clear that Juror Deal was not substantially impaired in his ability to consider and vote for the death penalty. He stated without hesitation that he was satisfied with the reasonable doubt standard and that he would be willing to follow the law.[5] He stated that he would be willing to consider the death penalty after being informed by the prosecutor that

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trial court had wrongfully reduced the defendant's right to exercise preemptory challenges. *Id.* at 342.

[5] When questioned by the deputy prosecutor he responded as follows, "Q: So you would be satisfied with a reasonable doubt standard? You would be willing to follow the law? A: Yes." ER 38.

Brown would never get out of prison and therefore would not be given the opportunity to kill again.[6]

According to this Court's decision in *Wainwright v. Witt,* the question of whether a trial court properly excused a juror for cause is essentially one of fact. The trial court is not obligated to make a specific finding that the juror was substantially impaired so long as there is a basis in the record for drawing such a conclusion, and in habeas corpus there is a presumption of correctness that attaches to the trial court's implicit finding. That being said, the presumption is not irrefutable and the trial court's finding must be "fairly supported by the record as a whole." *Id.* at 433.[7] In this case, it is not simply that the record does not fairly support the trial court's finding, but rather that the record affirmatively refutes any suggestion that Juror Deal would be unwilling to follow the law or vote for the death sentence if such a sentence was warranted by the evidence

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[6] When questioned by the deputy prosecutor on this point, juror Deal responded as follows, "Q: But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out of out again, which would be the situation in this case, so you think you could also consider and vote for the death penalty under those circumstances? A: I could consider it, yes. Q: Then could you impose it? A: I could if I was convinced that was the appropriate measure." ER 41.

[7] This Court in *Witt* also made clear that a contemporaneous objection by trial counsel does not preclude reversal provided that the state appellate court adjudicates the question on the merits, which is precisely what happened in this case. 469 U.S. at 429, n. 11.

presented at trial. That is the precisely the reason the Court of Appeals granted the writ.

Under AEDPA, a federal court may grant the writ where the state court decision was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceedings." *See*, Title 28 United States Code § 2254(d)(2). In this case, the state court record affirmatively demonstrates that the juror who was excused for cause was not substantially impaired in his ability to consider and vote for the death penalty. Under these specific facts, the Court of Appeals decision was a correct application of the AEDPA standard and this Court should therefore decline to grant the writ.

II. CONCLUSION

The Circuit Court meticulously reviewed the state court record and applied settled principles of law, including provisions of the AEDPA. The Circuit Court properly concluded that the state court record did not support a finding that Juror Deal was "substantially impaired" in his ability to follow the law. Thus, Uttecht has failed to present "compelling reasons" for review as required by Rule 10.

Moreover, this case is a poor vehicle for determining any issue because the Circuit Court left unresolved a compelling sentencing issue that would be an alternative basis for reversing the death sentence were this case remanded to the Circuit Court. For these reasons, this Court should deny Uttecht's petition for writ of certiorari.

Respectfully submitted this 30th day of November, 2006.

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